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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION,

*Petitioner,*

COLGATE-PALMOLIVE COMPANY and  
TED BATES & COMPANY, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT.

**BRIEF FOR RESPONDENT COLGATE-PALMOLIVE  
COMPANY IN OPPOSITION.**

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May, 1964.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.*

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**BRIEF FOR RESPONDENT COLGATE-  
PALMOLIVE COMPANY IN  
OPPOSITION.**

This brief is submitted by Colgate-Palmolive Company (hereinafter "Colgate") in opposition to the petition for a writ of certiorari to review the decree of the Court of Appeals for the First Circuit entered on December 17, 1963.

**Opinions Below.**

The first opinion of the Court of Appeals is reported at 310 F. 2d 89 (R. 37 ff.).\* The second opinion of the Court of Appeals is reported at 326 F. 2d 517 (Pet. App.

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\* Reference is thus made throughout to "Petitioners' Consolidated Record Appendix" filed in the second proceeding before the Court of Appeals and in this Court.

A).<sup>\*</sup> The first opinion of the Federal Trade Commission is reported at 59 F. T. C. 1452 (R. 9 ff.). The second and third opinions of the Commission appear at R. 50 ff. and R. 106 ff., respectively.

### **Jurisdiction.**

Jurisdictional requisites are set forth in the petition.\*\*

### **Question Presented.**

Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

### **Statute Involved.**

The petition sets forth a portion of Section 5(a) of the Federal Trade Commission Act. Section 5(i) provides as follows:

"If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of

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<sup>\*</sup> Reference is thus made throughout to the petition for certiorari and the second opinion of the Court of Appeals appended thereto.

<sup>\*\*</sup> See, however, Point III hereof.

thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected." (15 U. S. C. §45(i)).

### Statement.

This litigation involves three television advertisements used to promote the sale of Palmolive Rapid Shave, a product of Colgate. The advertisements, broadcast in 1959, illustrated the shaving of the human beard and the shaving of sandpaper after the application of Palmolive Rapid Shave. In place of sandpaper, the advertisements used a plastic "mock-up" to simulate sandpaper; as to this, the court below observed: "[A]s the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective" (R. 43).

The Commission's complaint charged Colgate and its advertising agency, Ted Bates & Company, Inc., with violation of Section 5 of the Federal Trade Commission Act solely with respect to the portrayal of the shaving of sandpaper.

After hearing, the complaint was dismissed by the Hearing Examiner. The Commission reversed. It ruled, first, that the particular grade of sandpaper portrayed could not be shaved as easily and quickly as shown in the advertisements (a ruling with which the court below agreed and which is not embraced by the instant petition). The Commission ruled, second, that assuming sandpaper could be shaved precisely as shown in the advertisements, the use of a mock-up for sandpaper nevertheless constituted, by

itself, an independent violation of the Act. In the Commission's view, it was a material deception to demonstrate the shaving of sandpaper when the sandpaper depicted was not in fact sandpaper—even assuming the test could be performed on real sandpaper exactly as depicted (R. 14, 19-25).

This latter ruling raises the issue—the legality of what this brief terms a “truthful mock-up”—which the petition asks this Court to review. The Commission's resulting order forbade, *inter alia*, the use of truthful mock-ups in demonstrations proving the quality or merits of a product (R. 7-8).

On review, the Court of Appeals stated that “we consider this a rather trivial case” and suggested that “little injury was done to the public by respondents' representations” (R. 41). The court found that Colgate's “only offense was the making of a single misrepresentation about a single product”, i. e., the facility with which sandpaper could be shaved after application of Palmolive Rapid Shave (R. 46, 39-41).

The court also ruled, after thorough discussion, that the Commission committed “fundamental error” (R. 45) in banning mock-ups which produced a visual image in precise conformity with reality (R. 42-6). While the court recognized that there is “a misrepresentation, of a sort, in any substitution case”, it stated “But . . . the Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see, not by the means” (R. 44).

The court specifically determined that truthful mock-ups are not materially deceptive:

“The Commission properly said that the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes

a difference. But where the only untruth is that the substance he sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (R. 45).

The court held that a mock-up "demonstration" was not illegal *per se* and concluded, "Under our construction there is no showing of any 'method' or 'practice' in the sense discussed by the Commission in its opinion" (R. 46).

Having thus held that Colgate made a misrepresentation only as to the facility with which sandpaper could be shaved after the application of Palmolive Rapid Shave, the court directed the Commission to frame a new order limited to the Commission's usual remedies for the making of a single misrepresentation (R. 46). The court's decree ordered that further proceedings be in accordance with its opinion (R. 36).

The Commission did not seek reargument or certiorari, nor did the respondents. Without further briefs or oral argument, the Commission issued on the same record a second opinion and a proposed final order under date of February 18, 1963 (R. 47 ff.); the stated purpose of the Commission was to insure that further judicial review "not be clouded by uncertainty as to the basis and breadth of our decision" (R. 52). The opinion reasserted the view that a truthful mock-up was itself an independent violation of law when used in a "demonstration" (R. 56, 61).

Colgate filed with the Commission on April 15, 1963 exceptions to the second opinion and order which urged,

among other things, that the Commission was proposing to defy the court's mandate, which the Commission had not sought to modify or reverse (R. 68, 66-73).

The Commission then issued on May 7, 1963 a third order and accompanying memorandum opinion which reiterated the Commission's argument that a truthful mock-up when used in a "demonstration" violated the Act (R. 102 ff.). On June 6, 1963 Colgate filed with the Commission a motion to correct the third order, which the Commission denied on the ground that the motion was "based upon the mistaken premise that the Commission's final order is in conflict with the prior decision and mandate of the Court of Appeals for the First Circuit . . ." (R. 133-34, 127-34).

Colgate also filed on June 6, 1963 in the court below a Petition to Correct, Review and Set Aside the third order of the Commission (R. 110ff.).

After full briefing and oral argument, the court rendered on December 17, 1963 the opinion and decree which are the subject of the instant petition (Pet. Apps. A and B). The court noted that it was not certain whether there was now before it a "new" Commission position on mock-ups or its old one "restated" (Pet. App. A 22 n. 5)\*. It made plain that the Commission was not legally free to disregard the court's mandate, but went on to say that it would make an exception and would examine the Commission's "present position on the merits rather than from the lim-

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\* The court also took note of the intervening decision of the Court of Appeals for the Fifth Circuit which agreed with the court's first opinion on truthful mock-ups. *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523 (5th Cir. 1963). (Pet. App. A 20 n. 1). The opinion of the Fifth Circuit states of the first opinion of the court below: "[W]e consider the standards worked out in that opinion well-reasoned, in keeping with principles established in non-television cases, and applicable to the case now before us" (323 F. 2d at 528).

ited standpoint of whether it comports with our previous opinion" (Pet. App. A 21-2).

The court reaffirmed its first holding that a truthful mock-up did not violate the Act:

"As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree. . . . If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (Pet. App. A 26, 29).

The court reached this conclusion after careful reexamination of the Commission's theory. The court stated that the Commission was attempting a distinction between a truthful mock-up in a "demonstration" which "proves" visually a quality of the product and a truthful mock-up in a "demonstration" which does not "prove" visually such quality (Pet. App. A 22-25). After exploring the application of the attempted distinction to various examples in the Commission's opinions and examples of its own, the court held the distinction to be untenable and stated that "we find no substantial logical difference between what the Commission disapproves of and what it accepts" (Pet. App. A 24-25).\*

The court pointed out that the Commission had no objection to the use of a truthful mock-up in portraying rich-looking ice cream. This, the court found, was illogical: it was "paradoxical" to deem a truthful mock-up of the

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\* The court also noted that the Commission had not even discussed in its second and third opinions examples which the court's first opinion had found "troublesome", e.g., the enhancement by the technology of television of the actual product as seen by television viewers, and the use of a mock-up for a testimonial which could not technically be photographed (Pet. App. A 28 n. 16; R. 44, 45 n. 8).

product itself undeceptive, while deeming a truthful mock-up of sandpaper in a shaving cream advertisement to be violative of the Act (Pet. App. A 28).

The opinion went on to find that the Commission's order violated this Court's admonition, in *Federal Trade Commission v. Henry Broch & Co.*, 368 U. S. 360, that a Federal Trade Commission order of this nature be capable of practical interpretation (Pet. App. A 25-6).<sup>\*</sup> The court felt that the principle of the *Broch* case was particularly apposite here because of the "relative insignificance of the issue before us" (Pet. App. A 26). On the Commission's own hypothesis, the mock-up issue involved no misrepresentation of the quality or appearance of a product, for it assumed the product could in reality exactly perform the "test" portrayed. The case was one where "in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up . . ." (*Ibid.*). The court also stated that the Commission exaggerated the situation; the Commission spoke of a buyer's "disillusionment" in learning of the use of a truthful mock-up, but failed to consider that the buyer would also learn that no quality or characteristic of the product had in fact been misrepresented (Pet. App. A 26-7).

The Commission's argument that its proposed doctrine was necessary to protect honest competitors (repeated at pp. 14-15 of the petition) was also treated. The court pointed out that this was merely a restatement of the Commission's position rather than an additional argument (Pet. App. A 24, n. 9). This argument assumes its conclusion and is completely circular.

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<sup>\*</sup> This Court stated in *Broch* that the severity of possible penalties made it necessary that Commission orders be "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application" (368 U. S. at 367-68).

The court concluded that the only practical solution was a rule applicable to all demonstrations in the nature of a test or otherwise: namely, that a truthful mock-up is not itself materially deceptive unless an express statement were made that no mock-up was used (Pet. App. A 28). "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (Pet. App. A 29).

Having, once more "undercut the basis" for the Commission's order, the court "instruct[ed] the Commission, as we thought we had directed it before, to enter an order confined to the facts of this case . . ." (Pet. App. A 29-30). It left to the Commission, as it had in its first decision, the writing of the terms of an appropriate order within the limits of the opinion (*Ibid.*).

The instant petition for a writ of certiorari followed.

## ARGUMENT.

### I.

The views of the court below—expressed in two painstaking opinions—and those of the Court of Appeals for the Fifth Circuit are plainly correct. The Commission's position, unapproved by any court, has neither statutory nor logical basis and has inherent ambiguities condemned by this Court in the *Broch* case.

The petition cites cases on representations extrinsic to product quality to argue that the Commission's position is required by controlling law (pp. 9-10). The court below did not disagree with these cases, which stand for the proposition that a product must possess the attribute which materially induces its purchase. Indeed, the court considered these cases and applied their teaching (R. 44-5; Pet. App. A 23, 27-8). The court pointed out that, under the Com-

mission's own assumptions as to a truthful mock-up, a purchaser of Palmolive Rapid Shave would find that it had the very quality or attribute which the demonstration had depicted (R. 43-5, Pet. App. A 20, 26). The court did not disagree with the argument in the petition that television viewers should be entitled to rely on visual proof. As the court made clear, viewers are indeed entitled to such reliance and they would in fact be undeceived if they relied upon a mock-up which is, under the Commission's own assumptions, precisely accurate (R. 44-5, Pet. App. A 26-7).

Words like "sham" or "fake" do not advance the Commission's argument. The essential question is whether a viewer is deceived when he looks at a transmitted image which represents the real with perfect exactitude. The court held, correctly, that he is not.

The petition also argues that the court below was without power to overrule the Commission and tries to treat the mock-up issue as one of appropriate remedy (Pet. 12ff.). This misapprehends the court's analysis.

As is clear from the Statement, *supra*, both of the court's opinions hold that no material deceit\* occurs when a truthful mock-up is used in a demonstration (R. 45-6, Pet. App. A 26, 29). This is clearly a holding on a question of law: the basic legality of particular behavior under the Act. Indeed, the petition expressly admits this when it states elsewhere that "the Commission undertook in a second opinion to reconsider the entire case, restating the theory of law on which the 'demonstration' part of the order was based..." (Pet. 4).\*\* It was to this "theory of law" that the court addressed itself. It found it to be illogical. In so

\* The petition (and the Commission heretofore) does not question that it is "material" deceit which violates the Act.

\*\* The Commission used the same language in its second opinion: "Our opinion failed to spell out sufficiently the theory of law on which the order was based..." (R. 52).

doing, it functioned on matters of rationality and reasonableness traditionally within judicial review of administrative action. See *Social Security Board v. Nierotko*, 327 U. S. 358, 368-70.\*

For two additional reasons, it is particularly disingenuous for the petition to claim that the court improperly substituted its judgment concerning "the framing of the appropriate relief for that of the agency" (Pet. 9): (a) in both proceedings before it the court, disregarding the suggestions of respondents here, expressly left to the Commission the framing of an appropriate order (R. 45-6, Pet. App. A 30); and (b) the petition's reference to an "alternative method of dealing with the problem . . . suggested by the court below"\*\*\* (Pet. 17) neglects to state that the court's suggestion was in response to an argument made for the first time by Commission counsel at the time of the second proceeding, that truthful mock-ups would increase the policing problems of the Commission.

It is submitted that the court exercised a traditional judicial function on review, that it discharged that function correctly on the merits—and that, in its willingness to reexamine anew the Commission's second and third efforts, it displayed a courtesy and deference which the petition does not appreciate.

\* As stated in *Grace Line Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711, 2d Cir. 1959:

"With respect to the scope of judicial review of administrative decisions, the cases are in agreement that there are minimal standards beyond which the courts cannot allow administrative bodies to go. The reviewing court must satisfy itself that the administrative decision has a 'rational' or 'reasonable' foundation in law [citing cases]; and when not so satisfied the court must reverse the administrative decision."

\*\* The court suggested a "properly formulated rule" shaped to evidentiary and other problems (Pet. App. A 29 n. 7). See Point II hereof.

## II.

The petition is also incorrect in its claim that it presents a "test case of major importance" (Pet. 8).

This claim is belied by the observations of the court below that this is "a rather trivial case" (R. 41), that it "may well be that little injury was done to the public by respondents' representations" (*Ibid.*), and that the issue as to which the Commission here seeks this Court's intervention is of "relative insignificance" (Pet. App. A 26).

Moreover, the court indicated that the Commission remains free to fashion a "properly formulated rule" about mock-ups (Pet. App. A 29 n. 17), thus intimating the Commission might gather and study facts about the use and need for mock-ups in television and pictorial advertising and thereafter frame guidelines for all advertisers (*cf. Procedures and Rules of Practice for the Federal Trade Commission*, 16 C. F. R. §§1.55, 1.56 (Oct. 24, 1963)). If, after such study, the Commission were still to adhere to its present position, that position can at that point be tested legally in the light of all relevant facts rather than on the meagre record of this adjudicatory proceeding.\*

Assuming *arguendo* that the mock-up issue were important, such procedure would seem especially called for. As Colgate pointed out below, the Commission's position is a midstream reversal of its previous publicly-announced policy. This was found as a fact by the Court of Appeals

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\* The Commission recently conducted a broad investigation of retail price advertising and thereafter issued general guides which in many respects differed sharply from the position it had previously taken in adjudicatory proceedings involving the same subject matter. Compare "Guides Against Deceptive Pricing", 29 Fed. Reg. 178 (1964) with *Baltimore Luggage Co. v. Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U. S. 860 and with *The Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765 (3d Cir. 1963).

for the Fifth Circuit in the *Carter* case, *supra* p. 6. There the court said of the Commission's present position, "It was not always thus" and it went on to quote a statement made by former Chairman Kintner in November, 1959:

"We realize that it is often difficult to impart true life quality to a product when it is photographed for television \* \* \*

"Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain \* \* \*

"Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception, unless, of course, it was carried beyond a reasonable point. If a glass goblet glistens too much, we still aren't likely to be alarmed" (323 F. 2d at 529 n. 10, citing *Advertising Age*, Vol. 30 No. 47, p. 1, November 23, 1959).\*

Thus, the "important test case" claimed by the Commission is a policy change, made without notice or investigation and rebuffed by two Courts of Appeals. Under these circumstances, the Commission would have done better to decide that its hasty shift in policy merited further study by the Commission rather than a review by this Court.

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\* Colgate also pointed out below that in the same month of November, 1959 the Chairman and staff members of the Commission met with officers of the Association of National Advertisers, Inc. concerning Commission advertising policy. The report of the meeting states that it was reviewed by Chairman Kintner prior to its publication. The report states, *inter alia*, the following:

"F. T. C. recognizes a rule of reason. . . . A theatrical artifice, to be condemned by the Commission, must represent a material deception as to the characteristics, performance or appearance of a product. . . . In general, F. T. C. is not concerned with what goes on in the act of bringing a TV picture to the screen--rather they are concerned with what the viewer sees" (Special Report to A. N. A. Members, "A. N. A. Officers Meet With FTC to Seek Standards for TV Visual Presentation", November 24, 1959, p. 2).

Indeed, other action of the Commission is inconsistent with its contention that the mock-up issue is of major importance. After the *Carter* case, which also involved a shaving cream and the truthful mock-up issue, was remanded to it by the Court of Appeals for the Fifth Circuit, the Commission did not seek certiorari on the truthful mock-up question. Instead, the Commission issued, on December 6, 1963, a modified order which does not prohibit such mock-ups (*Carter Products, Inc.*, Dkt. 7943, issued Dec. 6, 1963 and released Dec. 27, 1963).

The Commission so acted in a "demonstration" case which the Commission had argued in its brief to the Fifth Circuit involved a more serious offense than that here. The Commission's *Carter* brief had pointed out that a technological reason for the use of a mock-up was not present in *Carter*. The brief had also argued that *Carter* involved disparagement of other shaving creams, whereas Colgate "was not in the business of selling sandpaper, and did not in any respect compete with those who do". These factors, said the brief, resulted in a "manifest—indeed, critical—dichotomy" between the two cases (Commission Brief, 27, 25-30). No reason has been proffered by the Commission for thereafter creating a new dichotomy between these cases wherein the instant situation has suddenly become worse in the Commission's view than that in *Carter*.

This lack of even-handedness—coupled with the unheralded change from a previous policy and the Commission's difficulties in the attempted creation of new doctrine manifested by its three opinions in this case—reveal serious confusion. It is submitted that the Commission does not present, and is not ready to present, a "test case" to this Court. The public interest would be served if the Commission were left free to consider the nuances of the truthful mock-up issue in an industry-wide perspective.

## III.

The confusion and weakness in the Commission's position is reflected also by the procedural aspects of the case.

The first decision of the court below was clear and explicit. It ruled flatly that the Commission was wrong on the very mock-up point the Commission seeks to argue to this Court. The Commission had initially specifically posed the question whether the sandpaper test, regardless of its accuracy, was an independent deceptive "practice" because it offered "proof" in a "demonstration" (R. 14). To this question, the first opinion of the court responded:

"The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (R. 45).

The court held expressly that Colgate had not pursued an illegal "practice":

"Under our construction there is no showing of any 'method' or 'practice' in the sense discussed by the Commission in its opinion" (R. 46).

That ended the matter. The Commission then was free, beginning November 20, 1962, to seek reargument or certiorari. It chose not to do so, but instead on its own motion issued new opinions based on reasoning which the court had already contradicted.

By filing the instant petition, the Commission claims the power to restate a position after remand and thereby to postpone the 90-day provisions of 28 U. S. C. §2101(c) as to a question already decided by a Court of Appeals. The Federal Trade Commission Act does not appear to

grant the Commission such special power. The court did not order or invite a rehearing; instead, it ordered that further proceedings be in accordance with its opinion (R. 35-6, 46). Accordingly, it is submitted that the Commission was governed by Section 5(i) of the Act, which contemplates that after remand a Commission order will be "rendered in accordance with the mandate of the court of appeals" and provides for later judicial proceedings confined to correction of the Commission's order so that it will accord with the mandate of the Court of Appeals.\*

Equally, this Court's decisions do not appear to have granted the Commission the special power it asserts. The Commission was told in *Federal Trade Commission v. Minneapolis-Honeywell Reg. Co.*, 344 U. S. 206, 213, that its certiorari petition was untimely and that "litigation must at some definite point be brought to an end."<sup>3</sup> That principle would seem to apply here. If the Commission could now properly seek certiorari on the merits of the truthful mock-up issue, it will have been able to secure, merely by rewriting its opinions, a double review from a Court of Appeals plus a review by this Court.<sup>4</sup> Such a result is unseemly. The Commission appears to be the only agency which has sought certiorari under such circumstances. The presentation of a case in so singular a procedural situation also argues against the grant of a writ.

\* See *Virginia Lincoln Furniture Corp. v. Commissioner*, 67 F. 2d 8 (4th Cir. 1933), cited by the court below as dealing with a "comparable provision under the revenue acts" (Pet. App. A 21). It may be noted that the petition does not seek to present a question whether the Commission's latest order conforms to the first mandate of the Court of Appeals; respondents would assert that such order does not comply with that mandate if certiorari were granted.

\*\* Cf. also *Brown Shoe Co. v. United States*, 370 U. S. 294, 308-9; *Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77, 83; *Department of Banking v. Pink*, 317 U. S. 264, rehearing denied, 318 U. S. 801; Stern and Gressman, *Supreme Court Practice*, Sec. 6-3, pp. 206-7 (3d ed. 1962).

**Conclusion.**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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